

Before the
FEDERAL COMMUNICATIONS COMMISSION
 Washington, D.C. 20554

RECEIVED
 JAN 5 1999
 FEDERAL COMMUNICATIONS COMMISSION
 OFFICE OF THE SECRETARY

In the Matter of)	
)	
GTE Telephone Operating Companies)	
GTOC Tariff FCC No. 1)	CC Docket No. 98-79
GTOC Trans. No. 1148)	

**COMMENTS OF HYPERION TELECOMMUNICATIONS, INC.
 ON PETITIONS FOR RECONSIDERATION**

Hyperion Telecommunications, Inc. ("Hyperion"), by its undersigned counsel and pursuant to the Public Notice of December 4, 1998,¹ submits these comments on the Petitions for Reconsideration filed by MCI WorldCom, Inc. ("MCI WorldCom Petition") and the National Association of Regulatory Utility Commissioners ("NARUC Petition") regarding the Commission's Order that accepted a GTE Telephone Operating Companies ("GTE") tariff for filing for the provision of ADSL local exchange service.² The Commission should reconsider the *GTE ADSL Order* because the factual conclusions underlying the Commission's legal analysis and conclusions of law in the *GTE ADSL Order* have no support in the record.³

¹Pleading Cycle Established for Petition of MCI/WorldCom and National Association of Regulatory Utility Commissioners (NARUC) for Reconsideration of GTE DSL Order, Public Notice, CC Docket 98-79, DA 98-2502 (rel. Dec. 4, 1998).

²*In the Matter of GTE Telephone Operating Cos., GTOC Tariff No. 1, GTOC Transmittal No. 1148*, CC Docket No. 98-79, Memorandum Opinion and Order (rel. Oct. 30, 1998) ("*GTE ADSL Order*").

³As MCI WorldCom notes, the Commission should reconsider its Order because there are also a number of legal conclusions which are inconsistent with prior precedent and for which no reasonable basis has been provided.

No. of Copies rec'd 0+4
 List ABCDE

I. Hyperion Has Obtained Preliminary Information that Demonstrates that Interstate Traffic is Less than Ten Percent of Traffic Between End Users and ISPs

At the very heart of the Commission's assertion of jurisdiction in the *GTE ADSL Order* is its conclusion that at least ten percent of the Internet traffic using GTE's ADSL service to reach ISPs will have interstate "destinations." While Hyperion fundamentally disagrees with the FCC's analysis that a call to an ISP terminates at a host site rather than at the ISP, Hyperion has commissioned a survey of Internet usage in an effort to determine the percentage of traffic in a call from an end user to an ISP which, under the FCC's analysis, would be interstate. The preliminary results of that survey indicate that, as a percentage of total connect time, interstate transmissions fall well below ten percent of total telecommunications traffic.⁴ The results of Hyperion's survey are significant: pursuant to applicable Commission authority, mixed use special access facilities that carry less than ten percent of interstate traffic are assigned solely to the intrastate jurisdiction for tariffing purposes.⁵ Thus, based on the complete absence of record support for the Commission's factual assumptions and the preliminary Hyperion survey results, the Commission must reconsider its Order regarding

⁴The Hyperion survey is being conducted by Dr. James G. Williams and Professor Kenneth Sochats of the Department of Information Science and Telecommunications of the University of Pittsburgh.

⁵*MTS and WATS Market Structure; Amendment of Part 36 of the Commission's Rules and Establishment of a Joint Board*, CC Docket No. 78-72, CC Docket No. 80-286, Decision and Order, 4 FCC Rcd 5660 (1989).

It is important to note that the assignment of mixed use special access lines to the intrastate jurisdiction does not cede all of the regulatory jurisdiction of the Commission. The Commission's jurisdiction is retained in order to defeat state regulatory policies that frustrate or defeat important federal policies. *Id.*, Separate Statement of Commissioner Patricia Diaz Dennis.

the GTE ADSL tariff to take into account that interstate transmissions of data are far less common than the Commission has assumed.

While Hyperion disagrees with the Commission's use of an end-to-end analysis which includes service beyond the ISP, Hyperion admits that if that theory is applied, there is some traffic that qualifies as "interstate or foreign communication by wire."⁶ That traffic clearly would be within the jurisdiction of the Commission. The preliminary results of the Hyperion survey indicate,

⁶In the *GTE ADSL Order*, the Commission stated, "As explained in the *Universal Service Report to Congress*, because information services are offered via telecommunications, they necessarily require a transmission component in order for users to access information. We, therefore, analyze ISP traffic as a continuous transmission from the end user to a distant Internet site." *GTE ADSL Order* at ¶20 (citations omitted). Hyperion does not agree with the Commission's interpretation. No one disputes that telecommunications are an input for an ISPs provision of information services. No one disputes that telecommunications (provided by local exchange carriers over the local exchange network) connected to information services (provided by information service providers over, among other things, the Internet backbone) constitute uninterrupted "communications by wire." Hyperion, however, asserts that telecommunications, as a service provided by local exchange carriers, terminates at the point of connection to the ISP, either at the terminating end of the ADSL service, or when a call to an ISP's telephone exchange service number associated with the local calling area is answered.

If the Commission fails to rescind or revise its Order, its conclusion must be explicitly limited to ADSL service. A failure to do so woefully ignores the technological differences between the circuit switched telecommunications provided by local exchange carriers and the packet switched telecommunications used as an input for the information service providers product. The Commission's end-to-end analysis may have applicability within a regulatory framework adopted under circumstances where an open circuit is maintained between two users. Clearly, in that case, there is an originating user and a terminating user, and one need only compare the location of the two to establish whether that open circuit constitutes interstate or intrastate communications. This situation does not exist on the Internet. There is no open circuit establishing two endpoints. Instead, while an open circuit is maintained between an end user and an ISP by way of local telecommunications throughout the Internet session, tiny bursts of information go beyond the ISP sporadically throughout the session, and additional bursts are sent back just as sporadically. Quite simply, the only ends of a "continuous transmission" in an Internet session are those of the end user and the ISP, and whatever occurs across the Internet to "distant sites" is quick, sporadic, and once exchanged, communications from the "distant site" to the end user no longer continue.

however, that even with the Commission's use of its unsupported end-to-end analysis, the Commission's assertion of exclusive jurisdiction over ADSL service based upon application of its rules for special access dedicated lines is erroneous. In fact, based upon the preliminary results and Commission precedent, the states, and not the FCC, would have exclusive jurisdiction over GTE's ADSL service based upon the private line access service rationale adopted in the *GTE ADSL Order*. The basic premise for accepting GTE's ADSL tariff for filing at the FCC is unsupportable and the Commission must reconsider its *GTE ADSL Order*.

II. Even as Written, the *GTE ADSL Order* Will Not Permit GTE To Provide its ADSL Service

Even if the Commission does not reconsider the *GTE ADSL Order*, applying the specific terms of that Order means that GTE will probably not be able to provide any services pursuant to its ADSL tariff. Before GTE will provide ADSL service to customers, GTE has pledged to "ask every ADSL customer to certify that ten percent or more of its traffic is interstate." *GTE ADSL Order* at n.95, citing GTE Rebuttal at 15. Without conducting a survey similar to that commissioned by Hyperion, it is not possible for any of GTE's customers to make the certification necessary to receive GTE's ADSL service.⁷ Even if customers were prepared to conduct such a survey, few, if any, ADSL customers will be able to certify that ten percent or more of their traffic is interstate.

⁷To Hyperion's knowledge, GTE has not tariffed its ADSL service at the state level. Therefore, anyone now receiving GTE's ADSL service must be receiving it under GTE's federal tariff, and must have provided GTE with certification that interstate traffic represents 10% or more of the total traffic using GTE's ADSL service.

III. Reconsideration Must Consider an Approach that Does Not Conflict with State Commission Decisions Enforcing Interconnection Agreements

The Commission's conclusion that GTE's ADSL service was an "access service" subject to federal tariffing was based upon a "continuous transmission" theory for Internet communications that determined that communications over GTE's ADSL service did not terminate at the ISP's local server but continued to sites containing information sought by the end user. *GTE ADSL Order* at ¶ 19. In reaching this conclusion, the Commission has unintentionally complicated the issue of whether reciprocal compensation is owed for dial-up traffic between an end user and an ISP.⁸

In this case, the only issue presented is whether GTE's ADSL service may be tariffed at the federal level. The Commission asserted its "continuous transmission" analysis solely for the purposes of determining federal jurisdiction. While the Commission specifically stated it was not addressing the issue of reciprocal compensation, the Commission's "continuous transmission" analysis in its *GTE ADSL Order* is being used by BOCs in an effort to undo and end the unbroken

⁸The reciprocal compensation dispute can be reduced to these basic points: pursuant to state-approved interconnection agreements between CLECs and ILECs, each LEC owes the other reciprocal compensation for the transport and termination of telecommunications that is originated on one carrier's network and terminated on the other's. Many CLECs provide service to Internet service providers. In serving these end users, the CLEC transports and terminates large amounts of traffic to ISPs that is originated by customers of ILECs. One consequence of this development is that ILECs must pay reciprocal compensation to CLECs. In order to avoid these payments, ILECs have argued before state regulatory commissions that Internet traffic is interstate in nature, that the local exchange service to ISPs constitutes local exchange access, and that this traffic is not subject to reciprocal compensation obligations. CLECs, in response, have generally argued that whatever transmissions are used by the ISP in providing its service *after* it answers an incoming local exchange call are not relevant to the basic question of whether ILECs and CLECs provide local exchange telecommunications between end users and ISPs. In every proceeding to date, and there have been decisions in 25 states (representing approximately 80% of access lines nationwide), CLECs have prevailed and ILECs have failed to persuade regulators that local exchange traffic between end users and ISPs, which is treated for all other regulatory purposes as local traffic, is interstate and ineligible for reciprocal compensation.

string of state commission decisions in favor of CLECs that determined that reciprocal compensation is owed for local exchange traffic that is delivered to ISPs. Using the continuous transmission analysis, BOCs seek to focus on the communications that occur after the dial-up caller reaches its ISP. Ameritech has stated before the United States Court of Appeals for the Seventh Circuit, in an appeal of the Illinois Commerce Commission's decision that Ameritech must pay reciprocal compensation to CLECs for local traffic to ISPs, that it "does not matter" that the FCC did not intend to weigh in on the reciprocal compensation issue.⁹ To Ameritech, "[t]he FCC's ruling on where Internet traffic terminates--by itself--determines the outcome of this case."¹⁰ Bell Atlantic has modified its model interconnection agreement with CLECs to reflect its position that the *GTE ADSL Order* no longer requires Bell Atlantic to pay reciprocal compensation for dial-up traffic to ISPs. If the BOCs are successful in their efforts to require the use of this analysis in dial-up cases, the *GTE ADSL Order* could have the effect of forcing CLECs and state commissions to endure further litigation by ILECs in their effort to avoid paying reciprocal compensation for what in the end may be a *de minimis* amount of Internet traffic that travels out of the state. The Commission should consider whether the game is worth the candle. There is a far simpler approach that retains the Commission's ability to exercise jurisdiction over ADSL traffic and Internet communications and avoids distorting existing law.

⁹Brief of Plaintiff-Appellant Ameritech Illinois, *Illinois Bell Telephone Company v. WorldCom Technologies, Inc.*, Nos. 98-3150, 98-3322, and 98-4080 (7th Cir.), filed Dec. 23, 1998, at n.8.

¹⁰*Id.*

As discussed above, Hyperion disagrees with the Commission's interpretation of its "continuous transmission" analysis. The Commission has stated that "it has never found that 'telecommunications' ends where 'enhanced' information service begins." *GTE ADSL Order* at ¶ 20. Hyperion agrees with MCI WorldCom that in fact the Commission has made exactly that determination. Nonetheless, if the Commission seeks to assert jurisdiction over calls to ISPs, it only needs to recognize that when telecommunications are used to connect end users to information services that are provided across state lines, the entire transmission involves "interstate or foreign communications by wire" and is thus within the Commission's jurisdiction.¹¹ Whether telecommunications terminates at "distant Internet sites" is wholly irrelevant to whether GTE's ADSL tariff is properly filed at the Commission.

IV. Conclusion

The Commission must reconsider its *GTE ADSL Order* because it relies on facts that have no support in the record, namely that more than ten percent of Internet traffic involves interstate communications. The preliminary results of a survey on Internet usage commissioned by Hyperion demonstrate that the Commission erred by concluding that interstate traffic represents more than ten percent of Internet traffic. Once completed, Hyperion's survey will be filed with the Commission in this proceeding. In addition, significant policy reasons compel the Commission to reconsider its *GTE ADSL Order* so that existing state commission decisions regarding reciprocal

¹¹See Letter from Richard M. Rindler to Commissioner Harold Furchtgott-Roth, November 5, 1998, submitted with *ex parte* notice from Richard M. Rindler to Magalie Roman Salas, November 6, 1998.

compensation between LECs for dial-up traffic from end users to ISPs are not unnecessarily disrupted.

Respectfully submitted,



Dana Frix
Michael W. Fleming
Swidler Berlin Shereff Friedman, LLP
3000 K Street, N.W., Suite 300
Washington, D.C. 20007

(202) 424-7500 (tel)
(202) 424-7645 (fax)

Janet S. Livengood, Esq.
Director of Regulatory Affairs
Hyperion Telecommunications, Inc
DDI Plaza Two.
500 Thomas Street
Suite 400
Bridgeville, PA 15017-2838

Dated: January 5, 1999

CERTIFICATE OF SERVICE

I, Michael W. Fleming, hereby certify that the foregoing COMMENTS OF HYPERION TELECOMMUNICATIONS, INC. ON PETITIONS FOR RECONSIDERATION was served on this 5th day of January, 1999 upon the following persons by hand.

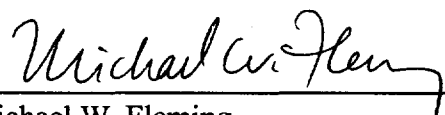
Magalie Roman Salas, Secretary
Federal Communications Commission
445 12th Street, S.W.
TW-A325
Washington, D.C. 20554

James D. Schlichting, Chief
Competitive Pricing Division
Federal Communications Commission
1919 M Street, N.W.
Room 518
Washington, D.C. 20554

International Transcription Services
1231 20th Street, N.W.
Washington, D.C. 20036

Charles D. Gray
James Bradford Ramsay
National Association of Regulatory
Utility Commissioners
1100 Pennsylvania Avenue, N.W.
Suite 603
Washington, D.C. 20044-0684

Alan Buzacott
Richard S. Whitt
MCI WorldCom, Inc.
1801 Pennsylvania Avenue, N.W.
Washington, D.C. 20006



Michael W. Fleming